STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Sage Telecom	**)**	
	)	**03-0570**
Petition for Arbitration of an Interconnection Agreement	**)**	
with Illinois Bell Telephone Company (SBC Illinois)	**)**	
under Section 252(b) of the Telecommunications Act of 1996	**)**	

BRIEF ON EXCEPTIONS OF SBC ILLINOIS

Karl B. Anderson
Illinois Bell Telephone Company
225 West Randolph Street, Floor 25D
Chicago, Illinois 60606
(312) 727-2928

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Illinois Bell Telephone Company ("SBC Illinois") hereby submits its Brief on Exceptions to the Administrative Law Judge's Proposed Arbitration Decision ("Proposed Decision") issued on November 20, 2003.

I. INTRODUCTION

The Proposed Decision's conclusions and decisions with respect to the ABS billing and collection issues are well-reasoned, supported by the evidence and should be affirmed, with one exception. That exception relates to the Proposed Decision's requirement that, in connection with Option 2 of SBC Illinois' ABS Appendix, Sage's customers be given a toll-free number to contact SBC Illinois directly regarding all "ABS-related inquiries." (Prop. Dec., p. 18). For the reasons discussed herein, this requirement is impractical and, if implemented, is likely to lead to customer frustration. As an alternative, SBC Illinois proposes to provide a toll-free number to Sage, which Sage customer representatives can use to contact SBC Illinois directly regarding ABS-related billing inquiries received from Sage's customers. SBC Illinois is also willing to participate on three-way calls with the Sage customer initiated by the Sage representative using that toll-free number. This approach would be a more efficient and practical means of responding to Sage customers' ABS-related inquiries than the approach of giving Sage customers a toll-free numbers to contact SBC Illinois directly.

In addition to its exceptions regarding the toll-free number requirement, SBC Illinois proposes that the Proposed Decision's analysis (p. 15) of the option for direct billing of Incollect ABS charges by SBC Illinois be modified to more fully reflect the evidence supporting the Proposed Decision's conclusion that this option should be within SBC Illinois' sole discretion to elect. SBC Illinois also proposes that the Proposed Decision's discussion of three other matters be modified to more fully and accurately summarize SBC Illinois' position.

With respect to the "intervening law" issue, SBC Illinois proposes that the alternative intervening law language contained in Attachment B to SBC Illinois' Reply Brief (which tracks the intervening law provision approved by the Commission in Docket 03-0239) be substituted for the intervening law provisions of sections 29.3 and 29.4, as modified and adopted by the Proposed Decision. For the reasons to be discussed, the Attachment B language more clearly resolves what the Proposed Decision characterizes as SBC Illinois' "legitimate concern." At a minimum, the language of section 29.4 should, consistent with the Order in Docket 03-0239, be amended to eliminate the "materiality" standard included in that section.

Finally, SBC Illinois proposes that a sentence in the Proposed Decision (p. 22) purporting to address the merits of language which SBC Illinois previously eliminated from its original intervening law proposal be removed from the Proposed Decision because it unnecessarily addresses an issue which is moot.

II. SAGE ISSUE 2

A. THE PROPOSED DECISION'S REQUIREMENT WITH RESPECT TO SECTION 6 OF THE ABS APPENDIX SHOULD BE MODIFIED

The Proposed Decision (p. 18) requires that SBC Illinois' ABS Appendix be amended to incorporate section 6 of Sage's proposed Appendix and make it applicable to SBC Illinois Option 2. Sage's proposed section 6 states that SBC Illinois is "responsible for facilitating all

End User complaints, inquiries and disputes associated with ABS calls." Sage Pet., Ex. 3, § 6.1. By comparison, SBC Illinois' proposed section 6 (which would, under the Proposed Decision, remain applicable to Option 3) states that Sage is responsible for facilitating all such complaints, inquiries and disputes. In connection with its decision to apply Sage's proposed section 6 to SBC Illinois Option 2, the Proposed Decision states that "SBC should provide a toll-free number, which should appear prominently on Sage's bills, for resolution of ABS-related customer inquiries." (Prop. Dec., p. 18).

SBC Illinois does not take exception to the requirement that Sage's section 6 be made applicable to SBC Illinois Option 2. SBC Illinois does, however, take exception to the Proposed Decision's requirement that an SBC Illinois' toll-free number for the resolution of ABS-related customer inquiries be placed on Sage's bills. Sage's proposed section 6 does not include a requirement that SBC Illinois provide such a toll-free number. Moreover, Sage did not propose such a requirement in its testimony. Accordingly, SBC Illinois has not previously had an opportunity to respond to the proposed toll-free number requirement and it is unsupported by the evidence.

A requirement that Sage customers be given a toll-free number to contact SBC Illinois directly regarding all "ABS-related inquiries" is impractical and should be rejected for several reasons. First, SBC Illinois does not have direct access to Sage end-users' bills. (SBC Ill. Ex. 2.0, p. 21). Thus, it would be extremely difficult for an SBC Illinois representative to directly assist a Sage customer with respect to a specific bill inquiry. For example, the SBC Illinois representative (unlike the Sage representative) would not be able to pull the bill up on a computer screen to verify the accuracy of the customer's verbal description of the charges at issue. Furthermore, even if the customer provides accurate details regarding the bill, SBC

Illinois would not have immediate access to any information regarding specific ABS calls. The detail records sent on the Daily Usage Files would have to be investigated, so that a resolution of an ABS bill inquiry would not take place at the time of the initial customer contact.

Second, SBC Illinois can only provide information related to the ABS calls. If Sage customers are invited to contact SBC Illinois directly via a toll-free number regarding all "ABS-related" inquiries, SBC Illinois is likely to receive inquiries regarding matters that may be related to ABS charges but which only Sage can answer. For example, if Sage customers call SBC Illinois to inquire regarding partial payment arrangements or to bill charges to a credit card, SBC Illinois would have to refer the callers back to Sage. Such bouncing of the customer back and forth between SBC Illinois and Sage is likely to result in customer frustration.

Third, SBC Illinois has encouraged Sage to place ABS charges on the same bills that Sage uses to charge for its local and long distance services. If Sage were to adopt this practice, which is commonly accepted within the industry, Sage should be able to significantly improve its ABS charge collection rate. If an SBC Illinois-provided toll-free number is included on a single invoice used to bill all charges, including ABS charges, there is possibility that customers will call that number to inquire about non ABS-related charges. SBC Illinois would have to refer the customer back to Sage, once again contributing to customer frustration.

For these reasons, SBC Illinois believes that it is appropriate for Sage, not SBC Illinois, to be the point of contact for inquiries by Sage customers regarding all charges, including ABS-related charges, billed to them by Sage. Under the current process in place today, SBC Illinois supports Sage with respect to ABS-related inquiries and complaints by responding to emails from Sage within five days. (SBC Ill. Ex. 2.0, p. 21).

To address the Proposed Decision's concerns, and as a way to implement Sage's proposed section 6 as it applies to SBC Illinois Option 2, SBC Illinois is willing to provide a toll-free number to Sage, which Sage customer representatives can use to contact SBC Illinois directly regarding ABS-related billing inquiries received from Sage's customers. SBC Illinois is also willing to participate on three-way calls with the Sage customer initiated by the Sage representative using that toll-free number. This approach would be a more efficient and practical means of responding to Sage customers' ABS-related inquiries than the approach of giving Sage customers a toll-free numbers to contact SBC Illinois directly.

For the foregoing reasons, SBC Illinois proposes that the last two sentences of the third full paragraph on page 18 of the Proposed Decision be deleted and replaced with the following:

> Thus, while Sage should have responsibility for ABS billing and collections, SBC Illinois should take primary responsibility for addressing customers' inquiries as they relate to the source of ABS calls and associated charges imposed by SBC Illinois. Sage did not make a specific proposal for implementing its proposed section 6. In its Exceptions, SBC Illinois stated that it would have no objection to making a toll-free number available to Sage, which Sage's customer representatives can use to contact SBC Illinois directly regarding ABS-related inquiries received from Sage customers. SBC Illinois stated that it is also willing to participate on three way calls with Sage customers initiated by the Sage representative using the toll-free number. The Commission finds that SBC Illinois' proposals are reasonable and should be reflected in section 6 of the ABS Appendix as applied to Option 2.

B. THE PROPOSED DECISION'S STATEMENTS SUPPORTING ITS CONCLUSION REGARDING THE DIRECT BILLING OPTION SHOULD BE SUPPLEMENTED

The Proposed Decision finds that direct billing of ABS Incollect charges by SBC Illinois "can reasonably be included in the Sage-SBC ICA as an option that SBC can select at its discretion." (Prop. Dec., p. 15). SBC Illinois does not take exception to this finding. The evidence fully supports the Proposed Decision's conclusion that the direct billing option is one that should be within SBC Illinois' sole discretion to elect. (Id.; Prop. Dec., p. 17). SBC Illinois,

however, suggests that the language setting forth the rationale for this decision be modified to more fully reflect that evidence.

In this regard, the Proposed Decision states that "we do not embrace the general proposition that carriers and customers are typically confused by charges from diverse carriers (whether or a single bill from their LEC or on separate bills from different providers). Nor do we find that, as a general proposition, carriers' direct billing costs are exceptional." (Prop. Dec., p. 15). As a general proposition, however, the bills received by a customer from "diverse carriers" are bills received from local exchange carriers, interexchange carriers, and/or wireless providers with whom the customer has made a deliberate and conscious decision to enter into a direct business relationship.[1] The situation at issue here is far different. SBC Illinois has no direct, ongoing business relationship with the end-user customers of Sage or any other LEC. To the contrary, end user customers of Sage will have made a conscious choice to select Sage as their provider of all local telecommunications services. When a Sage end user authorizes and accepts a collect call, or any type of ABS call, it excepts to receive the itemized charges its local provider bill. If SBC Illinois were to direct bill Sage customers for ABS charges, then those Sage end users could become confused, wondering why they were receiving invoices from a company that is no longer its local service provider. (SBC Ill. Ex. 1.0 (Rev.), p. 32).

Furthermore, because SBC Illinois has no direct, ongoing business relationship with the end users of Sage, it would be far more difficult for SBC Illinois to collect charges for ABS services used by Sage end users on an occasional basis than it would be for Sage to collect those amounts by including the ABS charges on the same monthly bills that it uses to charge its

[1] While it may be true, as Sage witness Timko asserted, that AT&T and MCI direct bill Sage's end users for non-local ABS calls accepted by Sage customers, the more typical arrangement is for AT&T, MCI, and interexchange carriers to enter into agreements to have LECs bill and collect such ABS charges accepted by their end users, as AT&T and MCI have done with SBC Illinois. (Tr. 181, 201-202, 211 (Smith); 408-09 (Burgess)).

customers for all other local and long distance services. The record shows that one of the reasons for Sage's currently poor collection rate on Incollect ABS calls is its insistence that such charges be billed separately from the charges for other services.[2] (SBC Ill. Ex. 1.0 (Rev.), p. 30; SBC Ill. Ex. 2.0, p. 12). Customers who ignore a separate bill for ABS services received from their own LEC (e.g., Sage) are even more likely to ignore a separate bill for ABS services received on an occasional basis from a LEC (e.g., SBC Illinois) with whom the customer has severed its direct, ongoing business relationship.

Moreover, SBC Illinois has not established systems for billing end users of other LECs (including Sage) with whom SBC Illinois has no direct and ongoing business relationship. To implement direct billing of Incollect ABS charges, SBC Illinois would have to develop and implement costly changes to its billing systems and processes in order to bill non-SBC Illinois end users who incur ABS charges on an occasional basis. (SBC Ill. Ex. 1.0 (Rev.), p. 32; SBC Ill. Ex. 2.0, p. 18).

In this regard, Proposed Decision (p. 15) states that the "record consists of the parties' dueling assertions, without substantial supporting data." However, SBC Illinois' testimony regarding the need to establish new systems and processes for billing Sage end users was unrefuted. On the other hand, Sage's witness admitted that her estimated cost of $1.07 per bill incurred by Sage to bill ABS charges reflects (i) the cost of preparing a bill for ABS charges that is separate from the bill for all other services provided by Sage and (ii) the costs (including postage and the cost of an envelope) of sending that separate ABS bill in a separate envelope. (Tr. 309 (Timko)). Sage would be able to avoid such costs if it adopted the industry standard

[2] There is no evidence whatsoever supporting Sage's unsubstantiated suggestion that Sage adopted the two bill systems with the agreement of SBC Illinois. (Sage Reply Br., p. 22). In fact, SBC Illinois has urged Sage on several occasions to put ABS charges on the same bills as it uses for all other services. To date, Sage has been unwilling to do so. (SBC Ill. Ex. 2.0, p. 12).

practice of including the ABS charges in the same invoice as all other charges billed by Sage to its end users. There is no evidence that the incremental costs of including ABS charges on the same bill with other charges is significant. To the contrary, the standard fee per message which other LECs have agreed to accept for billing and collecting ABS messages is three to five cents. (SBC Ill. Ex. 1.0 (Rev.), p. 20; Tr. 174-176 (Smith)).

The Proposed Decision states that "since any telecommunications carrier can call any other (absent blocking), every carrier and customer has to address the resulting billing (and billing cost) responsibilities associated with such universal interconnectivity." (Prop. Dec., p. 15). SBC Illinois agrees, and the manner in which the LEC industry has dealt with this issue is to assign responsibility for billing and collecting charges on LEC-to-LEC ABS calls to the LEC whose end users authorize and accept those charges. (SBC Ill. Ex. 1.0 (Rev.), p. 11; SBC Ill. Ex. 2.0, pp. 7-8, 9, 11-12). The standard industry practice reflects the operational and practical considerations discussed above, including the fact that it is only the LEC whose end users accept local Incollect ABS calls which has an ongoing business and billing relationship with those end users.

For all reasons discussed above and in the briefs of SBC Illinois and Staff, Sage is in the best position to actually bill and collect charges for Incollect ABS calls. Accordingly, the record fully supports the Proposed Decision's conclusion that direct billing of Incollect ABS charges by SBC Illinois should be an option within SBC Illinois' sole discretion to elect and that, if SBC Illinois does not elect this option, Sage should elect one of the three options included in SBC Illinois' proposed ABS Appendix.

To more fully reflect the record support for this conclusion, as summarized above, SBC Illinois proposes that the second and third paragraphs on page 15 of the Proposed Decision be modified as follows:

> Under Sage Option 1, SBC would directly bill Sage end-users for ABS charges, using customer information provided for a fee by Sage. We have already noted SBC's and Staff's concern that direct billing to Sage's local exchange customers will sow customer confusion. We have also already noted SBC's objection about additional billing duties and costs. ~~Nevertheless, t~~The Commission observes that since any telecommunications customer can call any other (absent blocking), every carrier and customer has to address the resulting billing (and billing cost) responsibilities associated with such universal interconnectivity. Moreover, new carriers regularly enter the telecommunications marketplace, and existing carriers exit, thereby creating billing and billing cost consequences for other carriers. The evidence, however, shows that in the circumstances at issue here, the LEC whose end users allowing and authorizing LEC-to-LEC Incollect ABS calls is generally in the best position to bill and collect the charges for such calls because only that LEC has a direct and ongoing business and billing arrangement with its end users. Thus, the standard industry practice is for the LEC whose end users accept LEC-to-LEC ABS calls to bill and collect the charges for those calls.
>
> ~~Consequently,~~ Moreover, although we do not embrace the general proposition that carriers and customers are always ~~typically~~ confused by charges fom diverse carriers (whether on a single bill from their LEC or on separate bills from different providers), ~~. W~~e we agree with SBC Illinois and Staff that there is a significant potential for customer confusion if Sage end users were to receive bills for ABS service from SBC Illinois, particularly in light of the fact that such end users will have made a conscious decision to select Sage, rather than SBC Illinois (or some other LEC) as their provider of local telecommunications services, including the ability to accept ABS calls. The evidence also shows that, because SBC Illinois does not have an ongoing business relationship with Sage's end users, SBC Illinois would be required to incur costs to develop new systems and processes for the purposes of billing, on an occasional basis, customers with whom it does not currently have a billing relationship. ~~Nor do we find that, as a general proposition, carriers' direct billing costs are exceptional. The specific evidence in this record consists of the parties' dueling assertions, without substantial supporting data.~~ Therefore, the Commission does not reject in principle Sage Option 1, which contemplates direct billing by SBC. Instead, we find that direct billing by SBC can reasonably be included in the Sage-SBC IAC as an option that SBC can select at its discretion.

C. OTHER PROPOSED REVISIONS

SBC Illinois proposes that the Proposed Decision be modified to more fully and accurately summarize SBC Illinois' position on three matters, each of which is discussed below.

1. The fourth full paragraph on page 12 of the Proposed Decision summarizes SBC Illinois' argument in response to Sage's assertion that each ABS bill costs Sage $1.07. SBC Illinois proposes that this paragraph be modified as follows to reflect the fact that SBC Illinois' argument is not simply based on its "view," but is supported by the testimony of Sage's witness:

> Sixth, SBC ~~endeavors to~~ deconstructs Sage's assertion that each ABS bill costs Sage $1.07. ~~In SBC's view,~~ SBC points out that Ms. Timko admitted that this amount reflects the cost of Sage's decision to bill ABS charges in a separate mailing, apart from the bills for Sage's own services. (*Tr.* 309). *Id.*, at 26. SBC contends that such practice deviates from the industry standard. *Id.*

2. SBC Illinois proposes that the following sentence be added to the end of the first full paragraph on page 12 of the Proposed Decision to summarize another deficiency in Sage's business practices related to ABS charges identified by SBC Illinois:

> SBC also contends that Sage has failed to adopt reasonable and commonly used call blocking procedures, such as immediately blocking ABS calls to a customer when that customer's unpaid balance of ABS charges exceeds a predetermined threshold amount, in order to prevent delinquent customers from running up unpaid ABS charges. *Id.*, at 18-19.

3. The second full paragraph on page 10 of the Proposed Decision notes that SBC Illinois justifies the difference in the billing and collection arrangements that SBC Illinois has with LECs and IXCs with respect to right of "full recourse" on the grounds that ABS traffic with IXCs is "one way" because IXCs can never accept collect calls from LECs. SBC Illinois proposes that the following language be added to the end of that paragraph to summarize SBC Illinois' reply to Sage's assertion that "Sage-SBC ABS traffic would, in effect also be 'one-way'":

In reply to Sage's argument, SBC states that there is no evidence from the other states in which Sage operates that supports its claim that there is no "reciprocity" between SBC and Sage with respect to ABS traffic. Moreover, in the IXC scenario relied on by Sage, there is *no* potential for ABS "reciprocity" because the IXC (unlike Sage and other UNE-P CLECs) does not provide dial tone service. SBC also noted that only a very small portion of the records sent to LECs by IXCs for billing and collection involve ABS traffic. Rather, those records include outbound interexchange calls placed by customers who have a direct business relationship with end users of other LECs. (*Tr*. 237-38). This lack of a direct business relationship is one of the primary reasons why the standard industry practice is for the LEC whose end user accepts an ABS call to assume financial responsibility for that call.

III. SBC ILLINOIS' ISSUE

A. THE PROPOSED DECISION SHOULD BE MODIFIED TO ADOPT SBC ILLINOIS' ALTERNATIVE INTERVENING LAW PROVISION OR, ALTERNATIVELY, TO REVISE SAGE'S PROPOSED SECTION 29.4

The Proposed Decision rejects SBC Illinois' proposed intervening law provision and, instead, approves Sage's proposed sections 29.3 and 29.4, with certain modifications to section 29.3. In particular, the Proposed Decision substitutes "February 19, 2003" for the term "Effective Date" in the first sentence of Sage's proposed section 29.3. The Proposed Decision notes that, with this change, either party may assert that governmental actions which occurred (or will occur) after February 19, 2003 constitute change of law events, even though such actions may have occurred prior to the Effective Date of the ICA.

SBC Illinois continues to believe that its proposed language (as revised in Attachment A to its Reply Brief), or its alternative proposal (set forth in Attachment B to SBC Illinois' Reply Brief) more adequately address what the Proposed Decision characterizes as "SBC's legitimate concern." (Prop. Dec., p. 23). For example, section 29.3, as approved by the Proposed Decision, encompasses "*amendments of the [Telecommunications] Act* [of 1996 (the "Act")] or any legally binding legislative, regulatory, or judicial order, rule or regulation or other legal action that *revises or reverses the Act* or any applicable Commission order or arbitration award *purporting*

to apply the provisions of the Act." (Emphasis added).[3] This language does not unambiguously encompass legislative, judicial, or regulatory action which, for example, does not revise or reverse the 1996 Act, but which does invalidate, modify or stay the enforcement of other laws or regulations that were the basis or rationale for any provisions of the Agreement and/or which otherwise affects the rights or obligations of either Party that are addressed by the Agreement. SBC Illinois does believe that such governmental actions, even if not covered by section 29.3, would be covered by section 29.4 which encompasses "any legally binding legislative, regulatory, judicial, or other legal action" not covered by section 29.3. Section 29.4, however, purports to limit the governmental actions which qualify as change of law events to those that have a "material" effect on a "material" term of the ICA. SBC Illinois' original proposal and the alternative proposal contained in Appendix B to its Reply Brief both reflected elimination of this "materiality" standard.

Based on the briefs filed by Sage and Staff, it is SBC Illinois' understanding that all parties interpret section 29.3 and/or section 29.4 as treating the D.C. Circuit Court's USTA decision and the FCC's TRO as change of law events. As presently worded, however, section 29.4 could lead to unnecessary disputes over what findings in the USTA decision and the FCC's TRO and implementing rules, and any other relevant government actions, "materially" affect "material" provisions in the Agreement and/or which affect the ability of either party to perform any "material" obligation under the Agreement, and what constitutes "material" provisions in the Agreement itself. In AT&T Communications, Inc., et al., Docket 03-0239 (Aug. 25, 2003), in which the Commission approved the intervening law language which the basis for the alternative proposal included in Attachment B to SBC Illinois' Reply Brief, the Commission expressly

[3] The ICA defines the term "Commission" to mean the Illinois Commerce Commission. (Sage Pet., Ex. 2, Sch. 1.2-4).

rejected language proposed by AT&T that would have imposed such a "materiality" standard. (See Appendix C to SBC Illinois' Reply Brief). In doing so, the Commission stated as follows:

> This issue is a question of whether or not a party is obligated to renegotiate a change of law that is not applicable and materially affecting this agreement. SBC feels that AT&T's language would serve only to provoke unnecessary disputes before the Commission and would lead to more disputes than agreements concerning the obligation to renegotiate. Specifically, SBC has a problem with the term "material" as used by AT&T in its proposed language.
>
> AT&T argues that "material" is used routinely in agreements and shouldn't be rejected just because they did not provide a definition for the term. It asserts that the "elasticity" of the term makes it ideal for such agreements. AT&T maintains that SBC's language would require too long of a waiting period in order to get the issue resolved.
>
> After reviewing both sets of terms we feel that SBC's language is appropriate. We agree with SBC that AT&T's language has the potential to lead to more disputes, because of the possibility for multiple arguments. One argument concerning the materiality and once that is resolved, an argument concerning the impact of the change in law. We adopt SBC's language to resolve the General Terms and Condition Issue No. 1(b).

AT&T Communications, Docket 03-0239 at 6-7.

The alternative language contained in Attachment B to SBC Illinois' Reply Brief is language approved in Docket 03-0239 and eliminates the concerns about SBC Illinois' original proposal raised by Sage and Staff in their briefs and reply briefs. For the reasons discussed above, that alternative language also more clearly addresses SBC Illinois' concerns regarding Sage's proposed sections 29.3 and 29.4 than do the revisions to Sage's section 29.3 made by the Proposed Decision. Accordingly, SBC Illinois proposes that the Proposed Decision be modified to adopt the intervening law provision included in Attachment B to SBC Illinois' Reply Brief.[4]

[4] The Proposed Decision states that "Sage and Staff have had no opportunity to consider or comment upon the suitability" of Attachment B "to the particular circumstances of the case." (Prop. Dec., p. 24). As SBC Illinois discussed in its Reply Brief (pp. 17-18), however, Sage did not make any of its objections to SBC Illinois' original proposal known prior to Sage's Initial Brief. Thus, the Reply Brief was SBC Illinois' first opportunity to respond to Sage's concerns, which are addressed by the Commission-approved language in Attachment B. As it happens, that language also addresses Staff's concerns with SBC Illinois' original proposal. Staff did not detail those concerns until its Reply Brief.

At a minimum, section 29.4, as proposed by Sage and adopted in the Proposed Decision, should be modified to eliminate the words "material" and "materially."

SBC Illinois, therefore, proposes that the text of the Proposed Decision, beginning with the second paragraph on page 23 and ending the with last paragraph of Section III, on page 24, be replaced with the following language:

> Accordingly, the Commission will reject SBC's proposed replacement language, even as revised. The Commission approves the alternative intervening law provision set forth in Attachment B to SBC's Reply Brief. This language addresses SBC Illinois' legitimate concerns by ensuring that the parties can invoke change of law to amend their Agreement to reflect governmental actions, including the TRO, which occurred prior to the effective date of the ICA but were not reflected in the ICA's provisions. Moreover, this language is virtually identical to the change of law provision that was approved by the Commission in the recently completed arbitration proceeding involving AT&T Communications and SBC (as modified to conform section numbers and cross references to the Sage-SBC Agreement) and does not contain what Sage and Staff contend are problems with the language of SBC's original proposal.

Alternatively, in the event that the Commission does not deem it appropriate to approve the Attachment B language for purposes of Sage-SBC Illinois' Agreement, the Proposed Decision should be amended to include the following paragraph immediately before the first full paragraph (which begins "Concerning Attachment B . . .") on page 24:

> In addition, the Commission concludes that Sage's proposed section 29.4 should be modified to eliminate the "materiality" standard as it applies to intervening law events covered by that section. This revision is consistent with the Commission's ruling on this same issue in *AT&T Communications, Inc., et al*, Docket 03-0239 (Aug. 25, 2003), pp. 5-6. As the Commission concluded in that case, the inclusion of a "materiality" standard would lead to more disputes because of the possibility for multiple arguments: one argument concerning whether a governmental action is "material" or has a "material" effect and, once that argument is resolved, an argument concerning the impact of the change of law. As revised, Section29.4 should read as follows:
>
> > 29.4 Regulatory Changes. If any legally binding legislative, regulatory, judicial or other legal action (other than an Amendment to the Act, which is provided for in Section 29.3) ~~materially~~ affects any ~~material~~ term of this Agreement or ~~materially~~ affects the ability of a Party to perform any ~~material~~ obligation under this Agreement, a Party may, upon written notice, require that the affected provision(s), be renegotiated, and the Parties shall renegotiate in good

> faith such mutually acceptable new provision(s) as may be required; provided that such affected provisions shall not affect the validity of the remainder of this Agreement. In the event that such new terms are not renegotiated within ninety (90) days after such notice, or if at any time during such 90-day period the Parties shall have ceased to negotiate such new terms for a continuous period of fifteen (15) days, the dispute shall be resolved as provided in Section 29.3 of this Agreement. For purposes of this Section 29.4, legally binding means that the legal ruling has not been stayed, no request for a stay is pending, and if any deadline for requesting a stay is designated by statute or regulation, it has passed.

B. THE PROPOSED DECISION SHOULD BE MODIFIED TO DELETE AN UNNECESSARY CONCLUSION REGARDING AN ISSUE WHICH IS MOOT

The Proposed Decision summarizes arguments made by Sage and Staff in support of their objections to two sentences in SBC Illinois' original intervening law proposal that address SBC Illinois' obligations to provide UNEs and UNE combinations. The Proposed Decision (p. 22) correctly notes that, in its Reply Brief, SBC Illinois revised its original proposal to delete those two sentences. In doing so, SBC Illinois made it clear that its proposed intervening law language was essentially the same as language that Sage had already agreed to in other states, and it was not until Sage filed its initial brief that Sage made its specific objections known to SBC Illinois. (SBC Reply Br., pp. 17-18). SBC Illinois also made it clear that, while it did not agree with the arguments made by Sage and Staff, it was not SBC Illinois' intention to raise as an issue for resolution by this Commission in this case the extent to which SBC Illinois' UNE obligations are governed by federal and/or state law. (Id., p. 18).

Notwithstanding SBC Illinois' voluntary withdrawal of the two sentences, the Proposed Decision purports to address the merits of those sentences, stating as follows: "The Commission believes that deletion was a prudent choice, because we agree with Sage and Staff that the deleted text would have undermined our state unbundling authority, in derogation of both federal and state law." (Prop. Dec., p. 22). This statement should be deleted from the Proposed

Decision because it unnecessarily addresses an issue which is moot and, for that reason, was not briefed by SBC Illinois.

Moreover, the Proposed Decision incorrectly suggests that SBC Illinois deleted the two sentences because it agreed with the argument of Staff and Sage that the language would undermine the Commission's unbundling authority. In fact, SBC Illinois does not agree with that argument. Section 251(d)(3) of the 1996 Act provides that the FCC

> shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section [251]; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3). SBC Illinois' proposed language was not intended to, and would not have had the effect, of eliminating the Commission's authority to enforce state unbundling requirements which are consistent with Section 251. In any event, for the reasons discussed, the issue is moot.[5]

For these reasons, the last sentence of the second full paragraph on page 22 of the Proposed Decision should be deleted.

[5] To the extent that Sage and Staff have suggested that the Commission has authority to impose unbundling requirements which are not consistent with Section 251 of the 1996 Act, SBC Illinois strongly disagrees. In the TRO, which is cited by Staff in support of its position (Staff Reply Br., p. 11, n. 12), the FCC stated that it does "not agree with those that argue that the states may impose any unbundling framework they deem proper under state law, without regard to the federal regime." TRO, ¶ 192, p. 122. The FCC noted that under federal preemption principles, "states would be precluded from enacting or maintaining a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in this Order." Id. The FCC found that "state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, is limited by the restraints imposed by subsections 251(d)(3)(B) and (C)" and "must be consistent with section 251 and must not 'substantially prevent' its implementation." Id., ¶ 194, pp. 123-24. Finally, the FCC found: "If a decision pursuant to state law were to require the unbundling of a network element for which [the FCC] has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and my frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules." Id., ¶¶ 195, p. 124.

IV. CONCLUSION

The Commission should affirm the Proposed Arbitration Decision, as modified in the manner proposed herein.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

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One of Its Attorneys

Karl B. Anderson
SBC Illinois
225 West Randolph Street
Floor 25D
Chicago, IL 60606
312/727-2928

CERTIFICATE OF SERVICE

I, Karl B. Anderson, an attorney, certify that a copy of the foregoing **BRIEF ON EXCEPTIONS OF SBC ILLINOIS** was served on the parties on the attached service list by U.S. Mail and/or electronic transmission on December 1, 2003.

Karl B. Anderson

SERVICE LIST FOR ICC DOCKET NO. 03-0570

David Gilbert
Illinois Commerce Commission
160 North LaSalle, Suite C-800
Chicago, IL 60601-3104
dgilbert@icc.state.il.us

Brandy Brown
Illinois Commerce Commission
160 North LaSalle, Suite C-800
Chicago, IL 60601-3104
bbrown@icc.state.il.us

Joseph E. Donovan
Henry T. Kelly
Kelley Drye & Warren
333 West Wacker Drive
26th Floor
Chicago, IL 60606
jdonovan@kelleydrye.com
hkelly@kelleydrye.com

Michael J. Lannon
Illinois Commerce Commission
160 North LaSalle, Suite C-800
Chicago, IL 60601-3104
mlannon@icc.state.il.us

Qin Liu
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
qliu@icc.state.il.us

James Zolnierek
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
jzolnier@icc.state.il.us